# EXHIBIT 81

**92 LA 780**

**CITY OF PONTIAC**

**Arbitration**

AAA Case No. 54 39 0518 88, Log A5600 2002 88

May 3, 1989

**In re CITY OF PONTIAC and AFSCME MI COUNCIL 25 and LOCAL 2002**

## Arbitrator(s)

Arbitrator: George T. Roumell Jr.

## Headnotes

### DRUGS AND ALCOHOL

**--Discharge -- Last-chance agreement** ▶ 100.552545

**Page 781**

City properly discharged 12-year employee who failed to abide by terms of last-chance agreement and who began to exhibit attendance problems, where he was warned three times that continued failure to abide by agreement would be cause for discharge; city's obligation to help its employees is not indefinite.

### DRUGS AND ALCOHOL

**--Last-chance agreement** ▶ 100.552545

ast-chance agreement, signed by employee but not union, was legally binding despite union's claim that ity improperly negotiated modification of "just cause" standard of discipline without union's agreement, where union did sign memorandum of understanding that required employee to sign and abide by last-chance agreement, and parties discussed terms of agreement.

### DRUGS AND ALCOHOL

**--Last-chance agreement -- Estoppel** ▶ 100.552545

Union is estopped from challenging last-chance agreement signed by employee one year prior to his discharge for failure to abide by agreement, since employee did not grieve conditions of agreement prior to discharge, and city had reinstated him after previous discharge in reliance on his apparent intention to carry out terms of agreement.

### DRUGS AND ALCOHOL

**--Discharge -- Violation of last-chance agreement** ▶ 100.552545

City's human-relations coordinator properly relied on letters from employee-assistance-plan therapist stating that employee was not attending weekly outpatient counseling sessions, despite claim that coordinator should have conducted independent investigation, where coordinator had long working relationship with therapist, she confirmed contents of letters with therapist, and employee admitted in meetings with coordinator that he had not been attending therapy sessions.

### ARBITRATION

**--Evidence -- Hearsay** ▶ 100.552545▶ 100.0775

Letters from employee-assistance-plan therapist stating that employee was not attending weekly outpatient counseling sessions are admissible, despite claim that letters are hearsay unsupported by any ther evidence, where information in letters was properly relied upon by employer, and due to confidential ature of EAP it may have been in all parties' interest that therapist not testify.

## Attorneys

Appearances: For the employer: John C. Claya, deputy city attorney; Harold J. Warell, labor relations administrator; Joanne Cook, human relations coordinator; Donald Kramer, director DPW & S; William Foster, cemetary superintendent. For the union: Byron E. DeLong, staff representative; Larry G. Marshall, local president; Chancey Hack, loca negotiator.

## Opinion Text

### Opinion By:

George T. Roumell Jr.

### Decision of Arbitrator
### LAST-CHANCE AGREEMENT

The grievance before this Arbitrator involves the discharge of G who had been employed by the City of Pontiac since December 21, 1977, primarily at the City Cemetary. In 1984, G had been discharged and was reinstated under a "Last Chance Agreement," the terms of which will be discussed later in this Opinion.

On July 17, 1987, Joanne M. Cook, Human Relations Coordinator for the City of Pontiac, advised G that he was in violation of the 1986 "Last Chance Agreement" for the following reasons and consequently would be notifying his Department supervisor of her recommendation for discharge:

Dear G ,

You were returned to work with the City of Pontiac under a Last Chance Agreement December 5, 1986. At that time I reviewed with you the following treatment plan recommended by St. Joseph Mercy Hospital Fox Center:

weekly individual therapy at Fox Center, two (2) Alcoholics Anonymous meetings a week and provide proof of attendance, urinalysis for alcohol/drug screening to be conducted by the City.

You indicated you understood that if you did not comply with St. Joe's recommended after-care treatment plan you would be discharged from City employment.

I met with you January 14, 1987. You reported that you had not set up therapy or attended A.A. meetings. I once again reviewed the above treatment plan and you indicated that you understood if you did not comply with treatment you would be discharged.

A letter I received from Matthew Jones, Fox Center, indicates that you entered therapy with him February 3, 1987 and attended seven sessions in ten weeks. April 6, 1987 is the last appointment you attended.

On the following dates I met with you, reviewed your treatment plan and stressed that if you failed to comply with treatment you would be discharged from City employment:

May 22, June 9, and July 13, 1987

In our meeting July 13, 1987 you stated that you have not attended therapy at any other treatment facility.

Matthew Jones set me a letter July 7, 1987 indicating that you have scheduled and missed appointments with him June 22, 24, and July 7, 1987.

Of the last thirtyt-two (32) weeks, under the Last Chance Agreement, you have attended only ten (10) therapy sessions and have not provided me with documentation of your A.A. attendance.

You are in violation of your Last Chance Agreement. I will be notifying your Department

**Page 782**

of these violations and, as stated in the Last Chance Agreement, recommending your discharge from City employment.

/s/

Joanne M. Cook, M.A., C.S.W.

Human Relations Coordinator

Thereafter, on July 20, 1987, G's supervisor, Mr. William Foster, the Cemetary Superintendent, met with G and advised him that he was discharged. Mr. Foster admitted that the basis for the discharge was the July 17, 1987 Cook letter quoted above. In addition, no written notice of discharge setting forth the basis for the City's action was forwarded to G or his Union representative. However, at the time of the discharge meeting, Union Steward Gregg Irvin was present.

According to the Union, it has been the City's practice to complete a document, indicating the basis for the City's action, namely, "oral warning, written warning, suspension or dismissal" and an explanation as to the "details of most recent incident," the "history of disciplinary action," and the signature of the employee, the date discussed with the employee and the supervisor and division head's signatures. The Union asserts that such notice was not given to G nor to his Union representative. As a result, Local 2002 President Larry Marshall met with the City's Personnel Director, James Banks, in order to seek an extension of the time for filing a grievance if the Union determined such action was necessary. See, Article VI "Grievance and Arbitration Procedure," Section 1, paragraph A and Article VII "Disciplinary Procedure," Section 2, Paragraph B of the parties' 1985-88 Collective Bargaining Agreement.

Both President Marshall and Personnel Director Banks agreed that the time limits for filing a grievance protesting G's discharge was mutually extended by the parties. A question did arise at the hearing in this case as to the length of said extension with the City maintaining that the grievance, which was eventually filed on August 28, 1987, was beyond the time of the extension, whereas the Union maintained otherwise.

The question of timeliness will be discussed later in this Opinion.

On August 28, 1987, the Union did file a "policy grievance" which read:

> AFSCME Local 2002, protests the discharge of bargaining unit employee G, Park Maintenance Man H for an alleged violation of an arbitrary "last chance agreement" entered into between G and the City of Pontiac. This grievance is based on but not limited [to ] Articles I and VII of the collective bargaining agreement between AFSCME Local 2002 and the City of Pontiac.
>
> Adjustment required: G should be returned to work immediately and made completely whole. [1]

As noted at the outset of this Opinion, G had been discharged in 1984 and was reinstated in 1986, pursuant to a Memorandum of Understanding and what has been termed a "Last Chance Agreement," setting forth certain conditions of reinstatement. The Memorandum of Understanding between the City of Pontiac and AFSCME, Local 2002 set forth certain conditions for the settlement of the prior grievance in which G's discharge had been *modified* to a disciplinary suspension. The City was directed to restore certain medical insurance and to pay wages and benefits for the time period from January 7, 1985 through May 9, 1985. In addition, the City was to place G on an unpaid leave of absence from May, 1985 until the date of reinstatement. The last condition of the Memorandum of Understanding read:

> The grievant will enter the Employee Assistance Program and will sign and abide by a Last-Change Agreement.

Local 2002 President Larry Marshall and grievant G signed the Memorandum of Understanding for the Union. Mayor Walter Moore, Labor Relations Administrator Harold J. Warell, Director of Public Works and Service Donald L. Kramer and Personnel Director Mary Lou Cochran signed the Memorandum of Understanding for the City. At the same August 15, 1986 meeting, the Last Chance Agreement was also entered, setting forth the following conditions for G's reinstatement:

> The City of Pontiac employee G is offered a chance to remain a City of Pontiac employee under the following conditions:
>
> (1) Immediately enter into St. Joseph Mercy Hospital Fox Clinic for in-patient psychological treatment.
>
> (2) Satisfactorily complete the inpatient treatment program recommended by that facility. A conference will be scheduled with the above named employee, City of Pontiac Human Relations Coordinator and Fox Center representative to plan an appropriate aftercare program.
>
> (3) Upon release from the program, the employee will attend the agreed upon affercare treatment at the regularly scheduled

times and provide written proof of attendance during a probationary period.

(4) Upon return to work, the employee will be placed on a nine (9) month probationary period.

(5) During this nine (9) month probationary period the employee will not be tardy or absent from the workplace without prior written approval from his/her direct supervisor. Tardy or absence not having this prior written approval will be grounds for immediate dismissal.

(6) Upon release from the program, the employee will be required to drop urine onsite at the Hillside Medical Clinic as required to insure the employee is following the treatment program. These visits will be the responsibility of the employee's immediate supervisor.

(7) If a drug screen indicates the presence of alcohol, or any controlled substance not prescribed and accounted for in writing by a licensed physician, the employee will be subject to immediate dismissal.

Any deviation from the above conditions will result in immediate dismissal. This agreement is not to be construed as setting a precedent, or establishing a past practice.

Neither President Larry Marshall nor any Union representative signed the Last Chance Agreement. G however, did sign the document.

During the arbitration nearing, the Union implied that the reason it would not sign the Last Chance Agreement was that the Union did not participate in the negotiations of the terms and conditions of said agreement. Thus, the Union contends that contrary to Article II, "Recognition Clause," the City violated the parties' Agreement by negotiating and entering into an agreement with a bargaining unit employee regarding a condition of employment without the Union's consent and agreement to those conditions. See, page 6 of Union's post-hearing brief.

The Union also asserts that since the Last Chance Agreement *modified* an existing condition of employment as to the contractual standard of discipline, namely, "just cause," (see Article VII, Section 2, C), the City improperly negotiated a modification of the standard without the agreement of the Union. It is for these reasons that the Union maintains that the Arbitrator should hold that a legally binding Last Chance Agreement did not exist.

The Arbitrator has carefully reviewed the Union's argument, but finds that it is unpersuasive in this matter. As noted, the Union did sign the Memorandum of Understanding dated August 15, 1986 with the condition that the grievant will enter an Employee Assistance Program and "will sign and abide by a Last Chance Agreement." At that same meeting, the terms of the Last Chance Agreement were discussed and gone over by the parties. There is no evidence on the record that G- was not completely apprised of each condition and of the discharge risk that he faced for nonadherence.

Furthermore, the Arbitrator finds that, based upon the Union's actions at the August 15, 1986 meeting, concurred in by G, and the fact that G, previous to his discharge, did not grieve the conditions of the Last Chance Agreement, G is now estopped from refusing to honor the Last Chance Agreement and this estoppel, because of G's action, would apply to the Union. It is G that had the responsibility to protest the conditions of the Last Chance Agreement by filing a grievance. When he did not, his Union could do nothing to undo his lack of protest.

Estoppel has been defined by the Michigan Supreme Court in *Holt v. Stofflet,* 33 Mich. 115, 119-20 (1953), as follows:

It is a familiar rule of law that an estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.

The concept of estoppel is often relied upon by arbitrators in the labor relations context. See, Elkouri and Elkouri, How Arbitration Works, (4th Ed. BNA 1985) at p. 399.

In *International Harvester Co.,* 17 LA 101 (1951), Arbitrator Whitley P. McCoy relied upon the estoppel theory to find that the reclassification of certain employees to a lower grade of work was improper, where the evidence indicated that the employer had assured the union during contract negotiations that these

employees would not be reduced in grade. Arbitrator McCoy listed the three elements of the estoppel doctrine, namely, a promise by one party, intended reliance by the other party, and resulting injustice that the promise is not *enforced*, and concluded that:

> Applying these principles to the facts of this case, the result is quite clear. The evidence leaves no doubt that the assurance was given to induce agreement on the contract and end the strike and that the union changed its position, suffered detriment in reliance on that assurance.

Although Arbitrator McCoy's decision in International Harvester Co. addressed the situation in which a union relied on assurances made by an employer during collective bargaining, it is clear that the estoppel theory applies equally as well to cases that involve reliance by an employer and the

**Page 784**

representations of an individual member of a collective bargaining unit made to that employer. This particulary follows when the protest against Last Chance Agreement is made almost a year after it was entered into and at the time the employee, by his failure to abide by the agreement, has been discharged. See, e.g., Armco, Inc., 86 LA 928 (Seidman, 1985).

All the elements necessary to invoke the doctrine of estoppel are present in this case. Union representatives signed the Memorandum of Understanding, which, to repeat, had the language that "the grievant will enter the Employee Assistance Program and will sign and abide by a Last Chance Agreement." G signed the Last chance Agreement and proceeded to take steps as if he was going to comply with the terms of that agreement. These actions caused the City to rely on the fact that G- intended to carry out the terms of the Last Chance Agreement and, as a result, the City reinstated G and in fact paid him some back pay.

It is too late to protest the terms of the Last Chance Agreement a year later when G, who had led the City to believe otherwise, began a course of action whereupon he was not intending to comply with the Last Chance Agreement. It is these facts that estops G through his Union from now objecting to the validity of the Last Chance Agreement.

Arbitrators have held that Last Chance Agreements, absent substantive evidence to the contrary, are both legally binding and socially desirable and will generally be honored. In *Porcelain Metals Corp.,* 73 LA 1133 (1979), Arbitrator Raymond R. Roberts discussed the validity and enforceability of last chance agreements hen he wrote at 1138:

> First of all, Last Chance Agreements are supported by consideration and may, therefore, be taken as a modification of the master Collective Bargaining agreement, in their application to special employees. The company gives valuable consideration for such agreements by giving up a contended right to discharge an employee at the time reinstatement is made pursuant to such an agreement. Being supported by valid consideration, such agreements are a valid contractual novation to the Collective Bargaining Agreement.
>
> Secondly, Last Chance Agreements are supported as a matter of public policy. They serve a useful social function of salvaging the employment of employees whose jobs would otherwise be lost. Many times, the impact of a "Last chance" Agreement will have sufficient shock value to rehabilitate an errant employee. If arbitrators did not enforce Last Chance Agreements, employers would cease to enter them, and the beneficial, social purpose which they serve would be lost to society generally and to members of the bargaining unit specifically.

It is for these reasons that the Arbitrator finds that the Last Chance Agreement is valid.

The question that remains is whether G in fact violated the terms and conditions of the Last Chance Agreement entered into with the City of Ponntiac.

According to the July 17, 1987 letter from Ms. Cook to G, the City was of the opinion that G had violated Item No. 3 of the Last Chance Agreement regarding the Aftercare Treatment Plan. The terms of the aftercare treatment was elaborated on in Exhibit 11E which provides for urinalysis one time a week at Hillside Medical Clinic; outpatient weekly counseling at St. Joseph Fox Center; attendance two times a week at Alcoholics Anonymous (AA) meetings; documentation of that attendance; and that the City Human Relations Coordinator and Hillside Clinic be notified of any medication prescribed by a physician or over-the-counter medication.

Ms. Cook discussed these conditions with G on December 5, 1986. According to Ms. Cook, G understood the rms, but wanted to "check out" the plan, presumably, with his Union representative. Ms. Cook agreed. On nuary 14, 1987, G and Ms. Cook met again and the terms and conditions of the plan were reiterated. Although at that point, namely, on January 14, 1987, G had not set up his weekly counseling sessions which

were to take place at St. Joseph Fox Clinic or began his attendance at AA meetings, G, according to Ms. Cook, indicated at the time that he signed the Aftercare Treatment Plan that he would begin to implement these conditions and that if he did not do so, he understood that he could be discharged.

The record indicates that on March 6, 1987, Ms. Cook wrote a "To Whom It May Concern" letter acknowledging that G had enrolled in the City of Pontiac's Employee Assistance Program and entered the St. Joseph Mercy Hospital Fox Center 28 day substance abuse treatment program in September, 1986. Furthermore, Ms. Cook recognized that G was:

> . . . .currently attending out-patient therapy with Matthew Joens [sic ] M.S.W. at Fox Center, attending AA meetings and submitting to random drug/alcohol screens at Fox Center and the City of Pontiac Clinic. All tests results conducted by the City have shown the presence of no drugs or alcohol.

Apparently, at the time Ms. Cook wrote this letter, G had in fact been following the conditions of his Last Chance Agreement, as elaborated in

**Page 785**

his Aftercare Treatment Plan. There is evidence on the record that from January 8 through March 11, 1987, G did attend two times a week meetings of Alcoholics Anonymous.

However, subsequent to that time, there was a change in G's conduct in terms of his adherence to the terms of his Aftercare Treatment Plan. On June 8, 1987, Ms. Cook received a letter from Matthew Jones, Jr., M.S.W., Outpatient Psychiatric, Substance Clinic, Fox Center at St. Joseph Mercy Hospital regarding G. The June 8, 1987 letter read:

> Dear Ms. Cook:
>
> Please be advised that G was admitted to the Fox Center on February 3, 1987 with a diagnosis of Alcohol Dependency. His treatment plan entailed psychotherapy and urinalysis weekly and AA two times per week. He attended seven (7) psychotherapy groups and failed to submit a urinalysis. His last contact was April 6, 1987.
>
> Please contact me if there are any questions.

Subsequently, a second letter dated July 7, 1987, was forwarded to Ms. Cook from Mr. Jones and read:

> Please be advised that G was scheduled for three appointments on June 22, 24 and July 7, 1987. He failed to keep any of these appointments. Also, he has failed to make any contact regarding a weekly psychotherapy group for which an appointment is not necessary.
>
> If I can be of further assistance, please contact me.

According to Ms. Cook's testimony, she met with G prior to the receipt of Mr. Jones' June 8, 1987 letter at which time Ms. Cook indicated that she went over with G the comments of the aftercare treatment plan, particularly the meaning of outpatient weekly counseling. At that time, Ms. Cook indicted that she stressed the importance of G complying with his treatment or risk discharge from the City.

On June 9, 1987, Ms. Cook again met with G. Although the meeting between Ms. Cook and G- occurred occurred on June 9, 1987, it is not clear from the record whether Ms. Cook, at the time of that meeting, was in receipt of the Jones June 8, 1987 letter. However, it does seem clear that Ms. Cook was aware, by virtue of her telephone conversations with Mr. Jones, that G had not in fact been adhering to the terms of his aftercare treatment program.

On July 13, 1987, another meeting occurred between Ms. Cook and G regarding his behavior. Presumably, Ms. Cook had received Mr. Jones' July 7, 1987 letter as well as the June 8, 1987 letter informing her that G had not been attending his weekly therapy sessions or attending AA meetings. Four days after the July 13, 1987 meeting, Ms. Cook drafted the discharge letter dated July 17, 1987, quoted at page 2 of this Opinion, informing G that he had violated the Last Chance Agreement with the City and that she would be recommending to his supervisor, William Foster, the Cemetary Superintendent, that he be discharged.

On July 20, 1987, Mr. Foster, on the basis of Ms. Cook's July 17, 1987 letter, informed G as well as Union Steward Marvin, who was in attendance at this meeting, that G was discharged from his employment with the City for violating his August 15, 1986 Last Chance Agreement.

The Union asserts that the City has not met its burden of proof that the August 15, 1986 Last Chance Agreement had been violated by G. The first condition alleged to have been violated by G, namely, the failure to attend the weekly outpatient counseling sessions at the St. Joseph Fox Center, is, the Union asserts, without merit. It is the Union's position that Ms. Cook, Human Relations Coordinator for the City, relied solely on the June 8 and July 7, 1987 letters from Mr. Jones, rather than conducting an independent in- vestigation o determine whether or not the statements in said letters were correct. Such reliance, the Union argues, in light of the firsthand testimony of G, negate the City's burden of proof.

G testified that the Jones letters were not entirely correct; that on a number of occasions that he was scheduled for his sessions with Mr. Jones, Mr. Jones was absent. As a result, the Fox Center receptionist would reschedule him for another date. G acknowledged, however, that the majority of dates that G attended sessions were the ones established by Mr. Jones.

G's testimony should be given greater weight by this arbitrator, the Union argues, over the hearsay documents of Mr. Jones' letters, which are unsupported by any other evidence on the the record and which were admitted for the purpose of serving as the basis for G's discharge.

In support of its argument, the Union submitted the arbitration opinion of Arbitrator Mario Chiesa in Oakland County Road Commission and Michigan Council 25, AFSCME, AFL-CIO, AAA Case No. 54 39 0273 85 (April 15, 1986). In that case, the arbitrator was confronted with a public employee who was alleged to have been tailgating a citizen. The citizen thereafter filed a complaint and was interviewed, but did not testify at the arbitration hearing. In recognizing that the complainant's

**Page 786**

statements were hearsay, Arbitrator Chiesa stated at pages 10-11:

> It is clear these statements given by Mr. Thurston at the December 6, 1983 interview, if being introduced to establish the truth of the catters asserted therein, would be hearsay. I realize that under AAA procedures, and in fact in cost arbitrations, the formal rules of evidence are not used. However, I have always had a practice, as has other arbitrators, of refusing to uphold any discharge or discipline which has as a sole basis hearsay evidence. This is not to say that hearsay evidence is always excluded. That's not the case at all. Sometimes hearsay is corroborated by other evidence, or it is cumulative, and certainly to that degree it must be considered. Furthermore, the fact that statements were made and complaints filed may in and of itself be probative of the ultimate question.

After such consideration, the arbitrator found that "much of the alleged wrongdoing could only be proved by what people observed or heard," (page 12) and concluded that the grievance must be sustained. The grievant's rendition of the event, which Arbitrator Chiesa found was reasonable, did not establish any wrongdoing.

Although this Arbitrator concurs with Arbitrator Chiesa's statements regarding hearsay testimony, he does not reach the same conclusion that he did in the Oakland County Commission case. The Arbitrator is mindful of the underlying purpose for excluding hearsay evidence under the Federal Rules of Evidence or Michigan Rules of Evidence is reliability. However, arbitrators have also admitted hearsay evidence in arbitration hearings under varying circumstances to aid the arbitrator in resolving the matter where the hearsay is reliable.

In *Snapper Power Equipment,* 89 LA 501 (1987), Arbitrator Weston admitted a written statement of a co-employee who was not available to testify over objection by the union. In doing so, Arbitrator Weston, at 505, wrote:

> "Hearsay" has been defined as evidence which derives its value in part from the veracity and competency of some other person. 29 Amer Juris 2, Evidence 493.
>
> With respect to the hearsay rule, one exception is particularly relevant to this case. Thus, the Federal Rules of Evidence include the following:
>
> Rule 804. Hearsay Exceptions: Declarant unavailable.
>
> "(5) Other exceptions. -- A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trust-worthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."

Therefore, I find that the exception in Rule 804 is applicable to this case. The declarant was unavailable due to the inability to serve him with a subpoena on 3 attempts by the Sheriff's Department. His statement, witnessed by three credible witnesses, was offered as evidence of a material fact, and the statement was more probative on the point than any other evidence which the proponent could procure through reasonable efforts. In addition, it is a record kept in the normal course of the Company's business. As such, it is an admissible document. Moreover, the interests of fairness and justice will best be served by admission into evidence of T's statement. Otherwise, there can be no inquiry as to why T threw objects at the grievant.

Also, I note that Rule 29 of the Voluntary Labor Arbitration Rules of the American Arbitration Association (amended February 1, 1987) provides in relevant part: "The arbitrator may receive and consider the evidence of witnesses by an affidavit, but shall give it only such weight as he deems proper after consideration of any objections made to its admission". I am mindful of the Union's strong objections to the admission of T's statement in the record. However" *I find that it was corroborated by truth-tending circumstances and, therefore, appears reliable.* (emphasis added).

After so noting, Arbitrator Weston quoted a statement made by Arbitrator Lipson in *Ambassador Convalescent Center, Inc.*, 83 LA 45 (1984), where, in admitting statements of witnesses who apparently were unavailable to testify because of the nature of the situation, i.e., an alleged patient abuse at a convalescent center, Arbitrator Lipson observed at 46:

"It is clear that the bulk of the Employer's case consists of hearsay evidence -- i.e., the patient, who was the actual victim of alleged abuse, did not testify, but hi statements went into the record through the testimony of other witnesses. The situation requires an inquiry into the role of hearsay evidence in discharge cases in general, and the significance of the kind of hearsay that is in the present record.

It is well known that fundamentally Speaking, hearsay evidence is not admitted in courts of law or other tribunals functioning under the Rules of Evidence to prove a fact that will determine the outcome in a case. Thus, it has been said:

"It a general rule, which is subject to many exceptions, that hearsay evidence is incompetent and inadmisible to establish a fact. 'Hearsay' has been defined as evidence which derives its value, not solely from the credit to be given to the witness upon the stand, but in part from the veracity and competency "of some other person."

Many of the reasons for the exclusion of hearsay are self-evident. For example, the declarant is not available for cross-examination, and the trier of fact is consequently hampered in determine the credibility and veracity of the person who was the source of the evidence. Nevertheless, hearsay is usually admitted in arbitration, because such proceedings are generally not

**Page 787**

governed by the Rules of Evidence. Accordingly, an arbitrator will frequently accept hearsay evidence "for what it is worth," or will regard the hearsay nature in determining the weight to be given the evidence.

There are good reasons for accepting hearsay evidence in a labor arbitration proceeding. Arbitration is generally informal and the participants are frequently nonlawyers, who cannot be expected to handle cases on the basis of legal technicalities, including the Rules of Evidence. Facts are determined, not by a jury, but by an arbitrator, who is expected to have the experience and expertise to evaluate evidence and to accord the appropriate weight to hearsay. Frequently, hearsay is the only evidence available in the work place setting, and the automatic exclusion of same could result in an incomplete record and a failure to accomplish a just result. On the other hand, an arbitrator must carefully *bear in mind the inherent weaknesses in hearsy evidence, particularly in the context of a discipline case where the employer has the burden of proving just cause.* (emphasis added).

After so writing, Arbitrator Lipson, as Arbitrator Weston had done in Snapper Power Equipment, made reference to the Federal Rules of Evidence and concluded, as did Arbitrator Weston, that the statements sought to be admitted would have been admitted in federal court under Rules 803 and 804 of the Federal Rules of Evidence. What apparently both Arbitrators Lipson and Weston were attempting to do is make general statements about the admission of hearsay evidence in arbitration and then buttress those statements by suggesting that the hearsay statement would also have been admitted in federal court.

bitrator Marlatt, in *Baker Marine Corp.*, 77 LA 721 (1981), though not relying on what a court might have one, admitted a written statement of a witness that the company had made "a good faith effort to secure the presence of" and, in so doing, explained at 722-723:

The Company offered evidence of having made a good faith effort to secure the presence of Mr. McDaniel as a witness in this arbitration, but found that he had since left his employment with the Security Service and had moved away from the area to points unknown. The company thereby offered in evidence a report made by McDaniel to the Company on May 13, 1980, which formed the basis of the Company's decision to discharge the Grievant. The Union vigorously objected to the admission of this document in evidence on the grounds of hearsay.

I will digress from the recital of the facts for a moment here, because the evidentiary question raised by this objection is crucial to the outcome of the case. The Company argues in its brief that the report of the Security Guard was "a business record kept in the normal course of McDaniel's business," but this is not a correct statement of the law of evidence. Neither the official record nor the business entry exception to the hearsay rule renders admissible in evidence writings or records made principally with a view to prosecution, or other disciplinary or legal action, as a record of alleged unlawful or improper conduct. Thus, a report of a policeman concerning his investigation of an offense is not admissible under either of these exceptions as evidence of the truth of the facts stated therein.

Therefore, if this evidence had been offered in a court of law, the judge would have no choice but to exclude it upon proper objection. The question to be decided is whether, or perhaps to what extent, an arbitrator is bound by the rules of evidence which prevail in the courts. The profession of arbitration is dominated by lawyers who, like myself, tend to think in terms of the familiar, and who find the formal rules of evidence a comfortable backstop when called upon to rule on objections. Edgar A. Jones, Jr., the president of the National Academy of Arbitrators, expressed the general opinion of arbitrators everywhere when he said of hearsay evidence, "Unless corroborated by truth-tending circumstances in the environment in which it was uttered, it is unreliable evidence and should be received with mounting skepticism of its probative value the more removed and filtered it appears to be." (Quoted from Jones, "Evidentiary Concepts in Labor Arbitration," UCLA Law Review 13 (1988) at p. 1278.)

I think, however, that the arbitrator who tries to fit the hearing within the concepts designed for the law courts does a disservice to the parties. Rules of evidence were developed over the years on the implied assumption that the jury in a court consists of people who are not particularly bright, and who might be less impressed by the highblown testimony of an expert than they would be by a good-old-boy who confides in them, "You know, they say. . . ." Arbitrators, by training, are presumably better qualified to evaluate the weight of hearsay evidence and put it somewhere on the spectrum between "strongly persuasive" and "vicious gossip." It stands to reason that the more the arbitrator can learn about the facts, the more likely his award will result in a fair and just deciion. For this reason, the arbitrator ought not totally to exclude any offered evidence unless it is clearly irrelevant or immaterial to any genuine issue in the case. It should be kept in mind that parties to an arbitration, unlike the litigants in court, do not have the power to subpoena witnesses to appear and testify at the hearing. The parties have to make do with the evidence they can dig up for themselves, and the arbitrator is supposed to fill in the gaps with common sense and good judgment. This i presumably why they have picked him to resolve their dispute, and he would hardly repay their confidence if he prevented either party, through legalitic nit-picking, from getting the facts out on the table.

I am very conscious of the fact, which the Union stresses in its brief, that it has been deprived of the opportunity to cross-examine Mr. McDaniel and thereby perhaps to impeach his very serious accusations against the Grievant.

**Page 788**

*All that a fair and conscientious arbitrator can do under these circumstances is to scrutinize the hearsay evidence very closely, and to give it little or no weight if there is any indication that the*

**Page 788**

evidence is untruthful, misleading, or biased. (emphasis added).

In each of the three cases, Snapper Power Equipment, Ambassador Convalescent Center, Inc. and Baker Marine Corp., there was a predicate, namely, good faith attempts to secure the witness; that the witness was unavailable and would not be able to be secured for the hearing. Secondly, in each quotation from the cases, this arbitrator has emphasized certain comments. Perhaps the point is the emphasized portion from Baker Marine Corp., where Arbitrator Marlatt referenced scrutinizing the "hearsay evidence very closely and to give little or no weight if there is any indication that the evidence is untruthful, misleading or biased." Or as Arbitrator Lipson noted, there is "an inherent weakness in hearsay evidence" and the emphasis by Arbitrator Weston that the hearsay evidence must be "reliable."

In this case, there is no question that Mr. Jones did not testify before this Arbitrator. Rather, he submitted two letters to Joann Cook who, admittedly, used these letters as a basis for the finding that G had not adhered to the terms of his Last Chance Agreement. Yet, as in the cases cited above, special circumstances do justify the consideration of the contents of those letters in this case. First, Ms. Cook indicated that she had a long working relationship with Mr. Jones at the Fox Center since the inception of the City's Employee Assistance Program; that she had been in contact via telephone conversations to check on the status of employees participating in that program, including G. Ms. Cook did testify before this Arbitrator.

In fact, in her July 17, 1987 letter, she did make note of the fact, after indicating that G had not kept his therapy appointments, that G indicated at the meeting of July 13, 1987 between Ms. Cook and G that he had "not attened therapy at any other treatment facility." [2] Thus, in addition to Mr. Jones' observations, Ms. Cook corroborated that information by her meetings, at least three, with G, in which he had admitted he had not been attending therapy sessions.

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[2] Ms. Cook elaborated at the arbitration hearing that she particularly questioned G about his attendance at the therapy sessions and whether he was attending them elsewhere because, in her experience, employees do make arrangements to attend other locations and was probing Mr. G as to whether he in fact had taken this action. From G's statements, he had not.

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Secondly, the Arbitrator finds that the confidentiality issue, which was discussed at length during the arbitration hearing, may have been a basis for the failure of Mr. Jones to appear to testify. The fact is, Mr. Jones' failure to appear or even the lack of a strong attempt to have him appear does not detract from applying the rationale of such cases as Snapper Power Equipment, Ambassador Convalescent Center, Inc. and Baker Marine Corp. Because Ms. Cook did telephone Mr. Jones about the situation and confirmed the contents of his letters, had a long relationship working with Mr. Jones on employee assistance plans and thus had come to rely on his statements. In addition, due to the nature of the EAP, it may have been in all the parties' interests that the confidentiality be preserved and that Mr. Jones not testify.

It is for these reasons that the Arbitrator will accept Mr. Jones' letters and consider them in determining whether the City has met its burden of proof.

The Union also asserts that the City has failed to meet its burden of proof with respect to the assertion that G did not provide documentation as to his attendance at AA meetings. The Union notes that Ms. Cook, in her testimony, stated that she did not receive any slips from G, even though she had provided him with forms at the January 14, 1987 meeting, establishing his attendance at AA meetings. The form completed by Ms. Cook, admitted into this record, does in fact verify G's attendance at AA meetings twice a week beginning on January 8, 1987 through March 11, 1987.

It may be that Ms. Cook did not recall that there was verification of attendance at AA meetings from January through March 11, 1987. The fact of the matter is that there were no subsequent verifications. This discharge took place in July, 1987. G had the opportunity to establish that he had attended meetings after March, 1987. The whole sequence that led to his discharge was the fact that the evidence was surfacing in early April, 1987 that G had decided, for his own reasons, to ignore the conditions of the Last Chance Agreement. At about the same time, according to Mr. Foster, he was beginning to exhibit attendance difficulties, although earlier in the year, G apparently had reasonable attendance.

What the Arbitrator is left with in this case is an employee who, in 1984, had been discharged and returned under a settlement or Last Chance Agreement whereby the employee was notified that adherence to the terms and conditions thereof were imperative to his continued employment with the City. Although his return to work was

**Page 789**

delayed, by a worker related back injury, he ultimately passed a return to work physical on December 5, 1986 and apparently would begin implementing an aftercare treatment program, pursuant to his Last Chance Agreement, in January, 1986. In early 1987, G did attend AA meetings, tested negative on non-scheduled urinalysis testing, and had been participating in outpatient therapy sessions. However, at some point in early April, 1987, G began to ignore the conditions of the Last Chance Agreement by not attending therapy sessions and being unable to produce proof of continued attendance at AA meetings.

Not only was his behavior subsequently noted by the professional at the Fox Center at St. Joseph Mercy Hospital, but it was likewise discussed with him by City Human Relations Coordinator Joann Cook on at least three occasions. At each meeting, Ms. Cook testified that she reinforced to G, and there is no testimony controverting this, that the terms of the aftercare treatment program must be followed or risk the loss of

employment with the City of Pontiac. Such warnings went unheeded by G.

There is some evidence that some of the sessions may have been rescheduled which mitigates, to a certain extent, G's absences. G attempted to contradict Mr. Jones' assertions in his June 8 and July 7, 1987 letters. The fact is, G admitted to Ms. Cook that he was not participating in all of the agreed-to conditions of reinstatement.

And, there is the further point that Ms. Cook, on three occasions, put G on notice that his continued failure to abide by the conditions of the Last Chance Agreement would be cause for discharge.

Based upon the record evidence, the Arbitrator is of the opinion that the City had met its burden of proof that G has violated the terms of his Last Chance Agreement. The evidence was not only the Jones letters, but the Cook testimony, both her phone calls with Mr. Jones and her conversations with G himself.

The Arbitrator recognizes that G has been in the employment of the City for approximately 12 years and that in some cases, the semiority of an employee may be considered a mitigating factor in determining the severity of the penalty. See e.g., *Gould, Inc.*, 76 LA 1187 (Boyer, 1981); General Electric Co., 74 LA 847 (Abrams, 1980). The City has demonstrated its willingness to assist its employees by establishing an Employee Assistance Program and allowing its employees, in this case G, to participate in such a program, with the hope that it would rehabilitate G and return to the work force as a productive employee.

As alluded to at the hearing, upon G's return in 1986, from December through February, 1987, his supervisor, Mr. Foster, testified that his attendance and work record were good. However, once the overtime season began, in April-May, 1987, G's attendance "began to fall off." This testimony seems to confirm the record evidence that G was no longer conscientious about meeting the terms of his Last Chance Agreement. The grievant's conduct has demonstrated that there is no reasonable assurance that he could offer that he will become a productive employee with the City.

The obligation by the City to assist its employee is not an indefinite one. The City has offered G an opportunity to help himself with their support, but, to repeat, G has not given the Arbitrator any choice in this matter.

For these reasons, the Arbitrator cannot find that the City acted unreasonably and contrary to the just cause standard when it decided to discharge G. To repeat, not only did G fail to live up to the Last Chance Agreement, but his pattern of attendance was consistent with this failure.

There is little question that if this was a matter of failure to live up to the Last Chance Agreement, but G was showing that he could fulfill his duties as an employee, that the results here might be different. But that is not what happened. Mr. Foster did testify about G's lack of attendance. There is a whole background here as to G's ability to fulfill his obligation as an employee. This was the reason for the Last Chance Agreement. When all these factors are combined, this Arbitrator cannot say that the City was unreasonable under the just cause standard.

It is for these reasons that the result here must follow. See e.g., *Dalhstrom Mfg. Co., Inc.*, 78 LA 302 (Gootnick, 1982) (where the arbitrator upheld the employer's action in discharging a gearhead operator for admittedly drinking after having been given one "last chance" to return to work from an earlier discharge on probation); Freeport Kaolin Co., 84-2 ARB Para.8484 (Nioholas, 1984) (termination of a 37 year employee was upheld after he had been found intoxicated while on the job having previously been given a second chance by the company.)

The Last Chance Agreement did not change the contract. Just cause is still the standard. The Last Chance Agreement was entered into in the context

**Page 790**

of just cause, namely, a reasonable action to attempt, for the final time, correct an employee who had a record of not fulfilling his contract of employment. The employee had difficulty with alcoholism. He attempted to respond. He did so to a point. When it was discovered that he was not fully responding, on three different occasions he was warned of the consequences. He took no action to comply with the Last Chance Agreement when warned. He did not go to his Union to file a grievance if he felt the conditions were unreasonable. G also began exhibiting attendance problems.

Finally, as alluded to at the beginning of this Opinion, there were some procedural questions raised by the City as to the timeliness of the grievance. Because of the results on the merits, it would unduly extend this Opinion to discuss the procedural issues and, therefore, the Arbitrator declines to do so.

G should understand that his Union and President Marshall have ably represent him. But, there is a limit to what the Union and its officers could do to help him. This Arbitrator is committed to the proposition under the just cause standard that there is a place for rehabilitation in employment relations. In this case, that opportunity was given. G was reinstated. But, after ample notice and with careful professional guidance, he just refused to continue to respond, leaving this Arbitrator no choice, despite the able representation by his Union and its officers.

It is for the above reasons that the Award that follows must be entered.

## AWARD

The grievance is denied.

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[1] The City notes that the August 28, 1987 grievance is characterized as a "policy grievance" and therefore does not in effect grieve G's particular discharge. However, such an argument is without merit for the statement of the grievance, quoted above, clearly sets forth the individual facts of the discharge of Park Maintenance Man II G, based on the alleged violation of a Last Chance Agreement.

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- End of Case -

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